



TOWARDS AN ENABLING POLICY FRAMEWORK FOR E-COMMERCE IN INDIA

Towards an Enabling Policy Framework for E-Commerce in India

Published by



D-217, Bhaskar Marg, Bani Park

Jaipur 302016, India

Tel: +91.141.228 2821, Fax: +91.141.228 2485

Email: cuts@cuts.org

Web site: www.cuts-international.org

©CUTS International, 2024

Study Team

Sakhi Shah, Former Assistant Policy Analyst, CUTS International

Pragya Singh, Former Research Associate, CUTS International

Ujjwal Kumar, Policy Analyst, CUTS International

Asheef Iqubbal, Senior Research Associate, CUTS International

The material in this publication may be reproduced in whole or in part and in any form for education or non-profit uses, without special permission from the copyright holders, provided acknowledgment of the source is made. The publishers would appreciate receiving a copy of any publication, which uses this publication as a source. No use of this publication may be made for resale or other commercial purposes without prior written permission of CUTS. The views expressed here are those of the commentators/authors and can therefore in no way be taken to reflect the positions of CUTS International and the institutions with which the commentators/authors are affiliated.

#2201

Table of Contents

1.	Introduction: Importance of E-commerce for Indian Consumers	5
2.	Tracing the Footprints towards a National E-commerce Policy	8
3.	Policy Issues Requiring Further Deliberation	14
	Understanding Different E-commerce Business Models	14
	Ensuring Platform Neutrality	16
	Addressing the Uneven Playing Field Among E-commerce Platforms	17
	Assessing Uncertainty and Ambiguities	18
	Institutionalising Holistic Stakeholder Consultations	19
4.	Way Forward: Towards an Enabling Policy Framework for E-Commerce in India	20
	Ensuring Level Playing Field and Fair Competition	20
	Fostering Collaboration Between Regulators	21
	Checking Optimal Risk-based Regulation	21
	Securing Ease of Running Businesses	22
	Reaching Out to Stakeholders	22

1

Introduction: Importance of E-commerce for Indian Consumers

E-commerce has become an integral part of everyday life, catering to every aspect, from buying clothes and household items to buying groceries and medicines. The Indian e-commerce market has also been one of the biggest beneficiaries of the COVID-19 pandemic. National lockdown measures introduced millions to the convenience of online shopping while prompting seasoned online shoppers to buy more online.

Accessibility to e-commerce services was no longer a privilege but rather a necessity at times, in both urban and rural areas. The pandemic brought about a structural shift in shopping behaviour and consumer trends. This was established through national-level surveys, which showed that 49 percent of respondents chose e-commerce to buy goods during the pandemic.¹

India's e-commerce market is projected to exceed USD 160 billion by 2028, up from an estimated USD 57–60 billion in 2023.² The growth of e-commerce has also been fuelled by rising internet penetration in India. Nearly half of the Indian population now has access to the internet, which was a mere four percent in 2007.³

It is reassuring to note e-commerce is expanding into India's rural areas due to increased internet penetration, digitisation, and technology uptake. There has been a significant improvement in language support, customer service, and logistics for e-commerce

¹ Joe C Mathew, 'COVID-19 made 49% respondents opt for e-commerce: LocalCircles survey', Business Today, 15 March 2021, <https://www.businesstoday.in/current/economy-politics/covid-19-made-49-respondents-opt-for-e-commerce-localcircles-survey/story/433857.html>.

² 'Indian e-commerce to grow 84% in 4 years, helped by Covid-19 impact: Study', LiveMint, 13 December, 2023, <https://www.livemint.com/news/india/indias-e-retail-market-set-to-surge-past-160-billion-by-2028-bain-flipkart-report-11702400182245.html>.

³ <https://www.statista.com/statistics/792074/india-internet-penetration-rate/>

operations.⁴ This has led to increasing confidence of consumers to purchase online, has led to enormous growth in the e-commerce space. The pandemic has also accelerated digital adoption.

This is best reflected in the increasing market size of e-commerce, as forecast indicates that by 2034, India's e-commerce market will outpace the United States, becoming the second-largest market globally. The report predicts that the e-commerce market will grow to USD 111.40 billion by 2025, up from USD 46.20 billion in 2020.⁵ It is then no surprise that such growth is seen as an important contributor to India's ambition of becoming a trillion-dollar digital economy by 2025.⁶

E-commerce is also expected that e-commerce will create over one million jobs in India. These employment opportunities are not limited to regular corporate jobs in e-tail. Still, they have influenced the complete supply-value chain, with logistics, warehousing, technology, and support services being the biggest beneficiaries. For every job that is created by the e-commerce industry, it is estimated that further 3-4 jobs can be created in downstream industries.⁷

Such livelihood opportunities generated by the growth of e-commerce help both skilled and unskilled people. For instance, most of the logistics workforce engaged in providing last-mile connectivity belongs to tier II and tier III towns with no formal degrees. On the other hand, highly skilled technology jobs, in addition to regular corporate functions like HR, finance & accounts, administration, and more, enable massive opportunities for skilled jobs. Thus, e-commerce can create an employment environment of more inclusive and balanced growth.

For India to sustain such unprecedented, phenomenal growth and enable e-commerce to realise its potential, a clear, consistent, and predictable legal and regulatory framework that can shape, foster, and support the growth of the sector by ensuring optimal competition for the benefit of consumers, is necessary.

Against this background, this paper traces the evolution of India's e-commerce policy and regulatory landscape, narrowing down to the leaked draft National E-commerce Policy

⁴ 'E-commerce grows by 36% in last quarter in India: Report', Times of India, 05 January, 2023, <https://timesofindia.indiatimes.com/blogs/voices/the-emphasis-of-e-commerce-in-the-rural-resurgence/>.

⁵ 'E-commerce grows by 36% in last quarter in India: Report', Times of India, 05 January, 2023, <https://timesofindia.indiatimes.com/blogs/voices/the-emphasis-of-e-commerce-in-the-rural-resurgence/>.

⁶ 'India's Trillion-Dollar Digital Opportunity,' Ministry of Electronics & Information Technology, https://www.meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf.

⁷ 'Impact of E-commerce on Employment in India,' KPMG, 2016, <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/12/impact-of-ecommerce-on-employment-in-india.pdf>

(NEP), 2021 and the proposed amendments to the Consumer Protection (E-Commerce) Rules, 2020. The paper then highlights certain issues that need greater deliberation and discourse for India's e-commerce policy and regulatory landscape. The paper concludes by suggesting a way forward in guiding principles to designing an e-commerce policy that can foster India's sustainable and inclusive e-commerce ecosystem.

2

Tracing the Footprints towards a National E-Commerce Policy

The regulatory and policy landscape in India governing e-commerce is still taking shape. Recent developments in this regard being draft NEP of 2021⁸ (not made public, but leaked in media) and proposed amendments to the Consumer Protection (E-Commerce) Rules, 2020. Along with the formulation of a NEP, some important regulations and policies affect the e-commerce space, as listed below:

- Press Notes related to Foreign Direct Investment (FDI Policy)
- The Competition Act, 2002⁹
- The Information Technology Act, 2000¹⁰
- The Personal Data Protection Bill, 2019 (PDPB)¹¹ and the Non-Personal Data Framework
- The Consumer Protection (E-commerce) Rules, 2020 (E-commerce Rules, 2020),¹² including the proposed amendments to E-Commerce Rules in 2021

FDI Policy

The Indian government's first attempts at effectively regulating the e-commerce space can be traced back to the many amendments to the national FDI Policy, starting from 2000. The Department of Industrial Policy and Promotion (DIPP) – now the Department for Promotion of Industry and Internal Trade (DPIIT) – in 2000 issued a notification allowing

⁸ Tarush Bhalla, 'New draft policy widens scope of e-commerce business,' LiveMint, 15 March 2021, <https://www.livemint.com/news/new-draft-policy-increases-the-scope-of-ecommerce-11615711774647.html>.

⁹ The Competition Act, 2002, https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

¹⁰ The Information Technology Act, 2000, <https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>.

¹¹ The Personal Data Protection Bill, 2019, http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf.

¹² The Consumer Protection (E-commerce) Rules, 2020, <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf>.

100 percent FDI in business-to-business (B2B) e-commerce, provided that the company receiving the investment would divest 26 percent of their equity to the Indian public in five years if the company was listed in other parts of the world.¹³ This was the first major policy decision affecting e-commerce.

The next big change to the FDI policy with respect to e-commerce was in 2012 when the DIPP stated that retail trading through business-to-consumer (B2C) e-commerce was barred for companies with FDI, regardless of whether they were engaged in a single brand¹⁴ or multi-brand retail trading.¹⁵ This was not received well by the industry as the government had only recently increased the FDI limits for brick-and-mortar stores in both single brand and multi-brand retail.¹⁶

Amidst the growing interest and debate around permitting FDI in B2C e-commerce, DIPP released a discussion paper in 2014 seeking feedback from stakeholders on whether to allow FDI in retail e-commerce or not.¹⁷ Subsequently, in 2015, the DIPP permitted FDI in e-commerce for single-brand retail trading entities, provided they also operated through physical stores in India.¹⁸

By 2016, the Indian e-commerce market had grown large, with growing concerns of e-commerce entities circumventing FDI policy. Thus, the government introduced significant changes in FDI policy, including expanding the definition of e-commerce and defining and distinguishing between 'inventory-based' and 'marketplace-based' models of e-commerce. While 100 percent FDI was permitted in the marketplace model through automatic route, no FDI was allowed in the inventory-based model of e-commerce.¹⁹

¹³ Department of Industrial Policy & Promotion, *Press Note No. 2 (2000 Series)*, Ministry of Commerce & Industry, https://dpiit.gov.in/sites/default/files/pn23_0.pdf.

¹⁴ Department of Industrial Policy & Promotion, *Press Note No. 4 (2012 Series)*, Ministry of Commerce & Industry, https://dpiit.gov.in/sites/default/files/pn4_2012_2.pdf

¹⁵ Department of Industrial Policy & Promotion, *Press Note No. 5 (2012 Series)*, Ministry of Commerce & Industry, https://dpiit.gov.in/sites/default/files/pn5_2012_2.pdf.

¹⁶ Retail Team, 'India notifies 51% FDI in multi-brand retail trading', Nishith Desai Associates, 25 September 2012, http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/india-notifies-51-fdi-in-multi-brand-retail-trading.html?no_cache=1&cHash=774283e9a27855b2597d5309df6cccea.

¹⁷ 'Discussion Paper on E-commerce in India,' Department of Industrial Policy and Promotion, 2013-2014, https://dpiit.gov.in/sites/default/files/Discussion_paper_ecommerce_07012014%20%20%2013.pdf.

¹⁸ Department of Industrial Policy & Promotion, *Press Note No. 12 (2015 Series)*, Ministry of Commerce & Industry, https://dpiit.gov.in/sites/default/files/pn12_2015%20%281%29.pdf.

¹⁹ Department of Industrial Policy & Promotion, *Press Note No 3 (2016 Series)*, Ministry of Commerce & Industry, https://dpiit.gov.in/sites/default/files/pn3_2016_0.pdf

In 2017, India came out with a fresh consolidated FDI Policy, which retained the 2016 provision vis-à-vis e-commerce.²⁰ However, a clarification issued in 2018 changed the FDI policy to the effect that e-commerce entities were barred from selling goods of any vendor. It or its group companies had an equity stake and were prohibited from requiring merchants to sell goods exclusively on their platforms, among other things.²¹ However, the marketplace e-commerce entities could enter into B2B transactions with sellers on its platforms and provide support services to sellers like warehousing, logistics, payment collection, etc.

Consumer Protection Regime

To deal with newer consumer protection issues for e-commerce, among other things, a new Consumer Protection Act was enacted in 2019, which included certain provisions 'unfair trade practices in its domain. There was also a specific mention of e-commerce in the Act. Subsequently, the Government also notified the Consumer Protection (E-Commerce) Rules, 2020. These Rules, framed under the Consumer Protection Act, 2019 (CP Act), are intended to complement the Act by regulating and governing e-commerce activities. In that regard, the E-commerce Rules, 2020 laid down duties and liabilities to be adhered to by e-commerce entities, marketplace e-commerce entities, sellers on the marketplace, and inventory e-commerce entities.²²

In June 2021, the Department of Consumer Affairs proposed amendments to the E-Commerce Rules, 2020. These proposed amendments have engendered intense debate because they focus more on the relationship between platforms and businesses rather than staying true to the intent of the CP Act of being consumer-centric. In other words, the proposed draft amendments intend to regulate businesses' concerns *vis-à-vis* e-commerce entities instead of direct consumer concerns.

The proposed amendments also pose ambiguity and uncertainty by adopting a 'one-size-fits-all' approach and unnecessarily micromanaging. It also tends to venture into other law's domain, thus creating a situation of overlapping jurisdiction. Overall, it tends to increase compliance burden, adversely affecting small businesses.²³

It is desirable that the E-Commerce Rules, 2020 under the CP Act does not end up in over-regulation and instead help consumers optimise their welfare and e-commerce shopping experiences. The 245th Report of the Committee on Subordinate Legislation on the Consumer Protection (E-Commerce) Rules, 2020, rightly stated that “*the emergence of*

²⁰ https://dpiit.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf

²¹ https://dpiit.gov.in/sites/default/files/pn2_2018.pdf

²² Committee on Subordinate Legislation, 'Two Hundred Forty Fifth Report on The Consumer Protection (E-commerce) Rules, 2020', Rajya Sabha, Parliament of India, 24 March 2021.

²³ For detailed analysis, see CUTS comments on the proposed amendments at: <https://cuts-ccier.org/pdf/cuts-comments-on-the-draft-amendments-of-the-consumer-protection-rules-2020.pdf>

global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have provided new opportunities for consumers.”²⁴

When it is increasingly recognised that new digital ways of living and transacting through digital means have increased consumer welfare, with the potential of accelerating it further, the concerns emanating from the same must be addressed timely and adequately.

Competition Regime

The e-commerce market study conducted by the Competition Commission of India (CCI) has revealed that a few e-marketplaces engage in price distortion by offering additional discounts on top of the prices set by the sellers of a product or service. This practice leads to a loss of control over the final price for the business users, as customers tend to prefer purchasing the service at a cheaper rate offered by the e-marketplace. The study also highlights the need to address concerns related to unethical pricing practices, such as offering discounts on inflated prices.²⁵

Among other things, the market study stipulated 'self-regulation' to ensure fair and competitive practices, thus facilitating a sustainable and equitable e-commerce market in India. Furthermore, to curb any discriminatory and unfair terms being incorporated in Platform-to-Business (P2B) contracts to the effect that e-commerce platform operators enjoy a leveraged status, the CCI put forth a mechanism to review exclusionary conducts in such contracts.²⁶

The market study also highlighted the practices undertaken by e-commerce platforms of manipulating search results and user reviews and ratings by fixing price algorithms to display inflated review ratings. The concerns surrounding platform neutrality were also cited as being of utmost importance to address. The CCI suggested that a pro-competition approach could be achieved only when there is an amelioration of credibility and transparency in search ranking, collection, use, and data sharing, among other things.²⁷

²⁴ Committee on Subordinate Legislation, 'Two Hundred Forty Fifth Report on The Consumer Protection (E-commerce) Rules, 2020', Rajya Sabha, Parliament of India, 24 March 2021.

²⁵ CCI E-commerce Market Study, pages 26-27, Available at <https://www.cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-andobservations1653547672.pdf>.

²⁶ CCI E-commerce Market Study, pages 26-27, Available at <https://www.cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-andobservations1653547672.pdf>.

²⁷ CCI E-commerce Market Study, pages 26-27, Available at <https://www.cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-andobservations1653547672.pdf>.

Many vendors are known to artificially hike prices and then offer these items on sale, creating an illusion of significant discounts. The Parliamentary Standing Committee on Finance, in its report 'Anti-competitive practices by Big Tech companies,' has underlined practices like "dynamic pricing," where prices are increased during periods of high demand, as well as misleading sales and discounts involving price inflation followed by discounting.²⁸

Additionally, Indian retailers have accused e-commerce platforms of indulging in 'deep discounting.' However, there is a need for clear definitions of commonly used terms such as 'deep discounting' and how it differs from 'predatory pricing' as defined under the Competition Act. It is essential to have precise and consistent terminology to ensure fair trade practices and protect the interests of both consumers and business users in the e-commerce sector.

Draft National E-Commerce Policy

On the same lines, the leaked draft NEP of 2021, in line with the previous versions, stipulates curbing anti-competitive practices and advancing fair competition in the e-commerce space. To that end, the leaked draft NEP restricts marketplaces from deploying algorithms that may result in 'digital biases' leading to prioritisation of sellers.

Taking a step back, the first official 'Draft National E-commerce Policy: India's Data for India's Development' was released by the DPIIT in February 2019, wherein the policy broadly addressed six issues revolving around: (i) data, (ii) infrastructure development, (iii) e-commerce marketplaces, (iv) regulatory issues, (v) stimulating domestic digital economy, and (vi) export promotion through e-commerce.²⁹ Even though the policy was touted as a positive step towards the regulation of the e-commerce space in India, there were several areas of the policy that were ambiguous, thus raising concerns about whether it was an internet policy, a data regulation policy, or an e-commerce policy.³⁰

²⁸ Parliamentary Standing Committee on Commerce, Promotion and Regulation of E-Commerce in India, One Hundred Seventh Report. Available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/159/172_2022_6_14.pdf

²⁹ 'Draft National E-commerce Policy: India's Data for India's Development,' Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, 23 February 2019, <https://dipp.gov.in/whats-new/draft-national-e-commerce-policy-stakeholder-comments>.

³⁰ 'Comments for Department for Promotion of Industry and Internal Trade on the Draft National E-commerce Policy,' CUTS International, 2019, https://cuts-ccier.org/pdf/Submission_of_comments_to_DPIIT_on_draft_National_E-commerce_Policy.pdf.

Subsequently, in early 2020, several media articles referred to an updated version of the e-commerce policy.³¹ The new policy stipulated the establishment of a new e-commerce regulator that could access source code and algorithms to mitigate biases in addition to accessing non-personal data for law enforcement and taxation purposes. Furthermore, the new policy in 2020 also acknowledged issues revolving around revenue base erosion, privacy, anti-competitive behaviour, consumer protection, national security, counterfeit products, piracy, and copyright infringement, among other things, that needed to be addressed.

The leaked draft NEP of 2021 was reported to be a vision document for the e-commerce ecosystem in India, which outlines a broad scope for regulatory oversight for key issues instead of a targeted focus on framing specific regulations.³² Even though it acknowledges and attempts to address concerns around anti-competitive behaviour and unfair competition in the market, various issues are not dealt with, such as access to source codes.

These drafts from 2018 to 2021 indicate how the government's thinking has been shaped up. Nonetheless, several policy issues in draft NEPs remain inadequately addressed, which require greater deliberation through robust stakeholder consultations. The objective should be to ensure that a national e-commerce policy can contribute to developing an equitable and inclusive e-commerce ecosystem for the country.

³¹ Aditi Agrawal, 'India's new draft e-commerce policy focuses on data, competition, counterfeiting, consumer protection,' Medianama, 3 July 2020, <https://www.medianama.com/2020/07/223-second-draft-e-commerce-policy-india/>.

³² Tarush Bhalla, 'New draft policy widens scope of e-commerce business,' LiveMint, 15 March 2021, <https://www.livemint.com/news/new-draft-policy-increases-the-scope-of-e-commerce-11615711774647.html>.

3

Policy Issues Requiring Further Deliberation

The third and latest leaked draft NEP of 2021, according to various media reports, has three expressly stated objectives:

- innovative growth of the e-commerce sector;
- consumer welfare; and
- equitable distribution of gains among all participants.

The leaked draft NEP, 2021 covers all models of e-commerce, i.e., inventory, marketplace, and hybrid models, across all forms of entities, natural and legal, with foreign and domestic investments. At the same time, the draft policy also differentiates e-commerce operators on the parameters of turnover, market size, active users, registered sellers, and sale of merchandise value, among others. In that regard, the latest draft NEP has been touted as one in the pursuit of inclusive growth of the e-commerce sector in India.

A similar story is the proposed amendments to the E-Commerce Rules, 2020. It has been necessitated in the name of consumer protection but has transgressed into dealing with issues concerning the relationship between sellers and e-commerce platforms. It has tried to address some of the P2B concerns raised in the draft NEP.

The industry players and experts have expressed their dissatisfaction with the draft NEP and the proposed amendments because the same may retard the growth of e-commerce in India. On those lines, the following are some policy issues that require greater deliberation to ensure that the growth of e-commerce is not hindered while at the same time advancing consumer welfare and competition in the market.

Understanding Different E-commerce Business Models

Despite the leaked draft NEP, 2021 covering all types of e-commerce business models, one of the biggest concerns by the industry associations and players is that there is a lack of understanding about how those different business models operate and function. Such failure to recognise and understand that different e-commerce models such as inventory and marketplace are not alike and may not share similar relationships with buyers and

sellers negates the need for or effectiveness of the proposed measures.³³ This lack of understanding about different business models is also reflected in the proposed amendments to the E-Commerce Rules, 2020.

Clubbing different kinds of business models and regulating and treating them as alike runs the risk of impacting businesses and consumers, creating a high level of uncertainty in an industry that is still in its nascent form. At the same time, the draft NEP and the proposed amendments increase the compliance burden on e-commerce platforms, irrespective of the business model being followed.

Such compliance burdens could have the potential to make the platforms inaccessible to small and medium businesses that depend on these entities for sustenance. While small businesses currently can avail support services such as transport, shipping, and delivery from e-commerce platforms at competitive prices, the same might not be possible in the future given the heavy compliance costs imposed by the draft NEP on platforms.³⁴

Further, it is important to distinguish and differentiate between various e-commerce business models to ensure a positive impact on overall consumer welfare. Also, the impact of different business models should be ascertained holistically and not merely from the perspective of traders.

For instance, the draft NEP requires e-commerce operators to bring out "clear and transparent policies on discounts," including the methodology to calculate "discount rates funded by platforms for different products/suppliers" and the implications of participation/non-participation in discount schemes. While ensuring transparency is a welcome move, one that could potentially ensure fair and equal treatment of all sellers/vendors, it could also make it difficult for discounts to be offered in mega online sales, which accrue benefits to consumers.

In that regard, it must be noted that discounts could result from various factors such as an increase in savings by online sellers owing to the shortening of supply chains and a decrease in traditional costs (typically accrued by brick-and-mortar shops).

The proposed amendments to the E-Commerce Rules even go further and call for 'flash sales' by e-commerce entities. On the one hand, the definition of 'flash sale' is ambiguous; on the other hand, a blanket ban on such sales can reduce consumer welfare. Since consumers love discounts, any curtailment on discount policies facilitated by e-commerce

³³ Digvijay Mishra, 'Industry groupings seek major changes in draft e-commerce rules,' The Economic Times, 22 July 2021, <https://economictimes.indiatimes.com/tech/technology/industry-groupings-seek-major-changes-in-draft-ecommerce-rules/articleshow/84624570.cms?from=mdr>.

³⁴ 'Over 4,000 online sellers urge govt to reconsider draft e-commerce policy,' Business Line, 20 July 2021, <https://www.thehindubusinessline.com/info-tech/over-4000-online-sellers-urge-govt-to-reconsider-draft-e-commerce-policy/article35426038.ece>.

operators needs to be guarded and should only be implemented after closely studying the whole issue.

Ensuring Platform Neutrality

‘Platform neutrality’ refers to non-discriminatory treatment by platform(s) towards the sellers associated with it. Such neutrality is necessary to promote economic democracy and equal opportunities to utilise and conduct business in the digital economy, where big e-commerce entities are *de-facto* regulators. While it has been reported that the draft NEP seeks to achieve platform neutrality, there have been reports that have flagged concerns relating to compromised neutrality in certain cases. For instance, the market study conducted by the CCI highlighted the increased importance of ensuring platform neutrality, especially for inventory-based e-commerce entities that perform dual roles of a platform service provider and a competitor of suppliers on the platform.³⁵

Furthermore, there have been concerns raised for the lack of transparency of the operations and disclosures by such platforms. In this context, the draft NEP states that all e-commerce operators shall ensure that any information collected through the platform is not used to obtain a market advantage against sellers on its platform.

In addition, e-commerce operators will have to ensure that their algorithms are unbiased. This would help in addressing general concerns of small businesses in their interaction with dominant platforms, such as the adoption of discriminatory practices by platforms to favour specific service providers; unreasonable platform services deterring small businesses; lack of transparency in the listing of goods and services; changes in terms and conditions by platforms without prior notice; and unilateral delisting/suspension of accounts, among others.

The true spirit of platform neutrality is an important aspect of an inclusive e-commerce ecosystem that fosters business growth as well as ensures equal access to the vast opportunities that it presents. To achieve that, exhaustive deliberations leading to a clear, optimal, and succinct regulatory framework is required, which can keep a check on the operations and functioning of the platform vis-à-vis the sellers on the platform to ensure that economic democracy and competition thrives on such e-commerce platforms. The nature and degree of regulation can also be designed accordingly for different types of business models through a multi-stakeholder consultation process.

³⁵ ‘Market Study on E-commerce in India: Key Findings and Observations’, Competition Commission of India, 8 January 2020, http://cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

However, the intention to deal with the issue of platform neutrality via consumer protection regime, as reflected in the proposed amendments to the E-Commerce Rules, is a bad idea. This is not the right forum.

Addressing the Uneven Playing Field among E-commerce Platforms

Generally, India's emerging e-commerce policy scenario and the draft NEP make a regulatory distinction between domestic and foreign e-commerce platforms. For instance, while FDI rules bar foreign firms from adopting an inventory-based model, domestic firms have no such restriction. Domestic e-commerce firms are free to have their inventories while hosting other sellers, hence adopting the dual role of a platform service provider and competitors for the online sellers.

Drawing on a similar distinction, the draft NEP acknowledges the importance of data as an asset and the need to use data emanating from India for Indian entities. Furthermore, while discussing the e-commerce operator of significance, the draft carves out additional compliance requirements for foreign firms. Additionally, the draft also states that e-commerce entities hosted by or on behalf of entities having foreign investment shall comply with the FDI rules. It also says that the latter shall prevail in case of inconsistencies between the draft NEP and FDI rules. Thus, the policy and the regulatory distinction between foreign-funded and domestic e-commerce platforms have been created. This goes against the principle of competitive neutrality.

Moreover, such policy and the regulatory distinction between foreign and domestic e-commerce firms is, in essence, a protectionist measure. This could not only undermine efforts to tackle the growing protectionism globally but will also have a bearing on the competitiveness of the domestic e-commerce ecosystem. Such distinctions are also against the spirit of a series of reforms that the government has introduced lately. To maintain competitive neutrality, such policy, and regulatory distinctions, if at all pressing, should be a time-bound, bare minimum, and with a tangible objective to achieve.

However, the E-Commerce Rules, 2020 and the proposed amendments do not pose any distinction between FDI and non-FDI e-commerce entities. However, there are several concerns regarding the proposed amendments, including the non-suitability of the consumer protection regime to address platform-to-business concerns.³⁶

³⁶ For details, please refer to: <https://cuts-ccier.org/pdf/cuts-comments-on-the-draft-amendments-of-the-consumer-protection-rules-2020.pdf>

Assessing Uncertainty and Ambiguities

There are several provisions, including definitions, in the draft NEP and the proposed amendments to the E-Commerce Rules, which are ambiguous and confusing. Addressing such points of ambiguity will go a long way in enabling investor confidence and allowing smooth functioning and the growth of the e-commerce ecosystem resulting in a win-win for all the stakeholders concerned.

For instance, it has been reported that the draft NEP provides that the government may, from time to time, notify parties that fall in the definition of "associates and related parties." The proposed amendments to the E-Commerce Rules have included 'related parties' and 'any entity engaged for the fulfilment of orders' in the very definition of 'e-commerce entity.' In other words, logistics (like warehouses), delivery systems (delivery boys, postal firms, including India Post), and perhaps even payment firms could be construed to be part and parcel of the term "e-commerce entity" and so will any 'related parties' (e.g., having a common chain of directors, more than 10% ultimate common shareholders, 5% shareholding in related entities, etc.).

There are similar other uncertainties and ambiguities in certain other provisions as laid down in the draft NEP and the proposed amendments to the E-Commerce Rules, which require greater deliberation to ensure a clear and concise regulatory framework for e-commerce in India.

For instance, the draft NEP provides for several provisions for curbing counterfeit practices. In that regard, the draft seeks to make e-commerce platforms jointly and severally responsible for ensuring the sale of genuine products and ensuring the traceability of sellers, especially for end-to-end fulfilment of products by the e-commerce platform. Given that e-commerce platforms are intermediaries by connecting sellers and buyers, the draft NEP needs to provide sellers with standards and technical regulations. Moreover, there appears to be ambiguity around the scope of end-to-end fulfilment, given that there are various instances where e-commerce platforms provide services over and above product display. These may include storage, logistics, product advertising, or promotion. Hence, there is a need for clarity on the definition of end-to-end fulfilment, based on certain guiding principles.

Another provision in the draft NEP, which is well-intentioned but remains vague and arbitrary, is for the creation of a body of industry stakeholders and trusted parties to identify "rogue e-commerce entities." The provision fails to provide clarity and details on the procedure for constituting such a body, the composition of members, and its powers and functions, among other things. The process for identifying rogue entities has also not been provided for, which fuels ambiguity and arbitrary discretion to the body in classifying the same. This decision could have far-reaching consequences for affected e-commerce platforms.

As far as the proposed amendments to the E-Commerce Rules are concerned, several provisions pose uncertainty and ambiguity. For instance, the definitions of 'e-commerce entity,' 'flash sale,' 'cross-selling,' etc., are ambiguous. The intention of holding e-commerce entities liable for third party's non-fulfilment of consumer orders also goes against the established legal principles. Similarly, overlapping jurisdictions under the proposed amendments will also add to the current uncertainty and ambiguity, particularly for the data and competition regimes.

Further, the proposed Digital India Bill aims to encompass issues like consumer protection, electronic contracts, digital signatures, online dispute resolution, re-calibrate liability of intermediaries. It also aims to regulate fair trade practices, prevent market power concentration and gatekeeping, and address distortions. However, some of these issues currently fall under Sections 3 and 4 of the Competition Act, which prohibit anti-competitive agreements and abuse of dominant position. Subsequently, there is a potential overlap with the Competition (Amendment) Bill, 2023, and the Consumer Protection Act, 2019, both addressing similar concerns of anti-competitive behaviour by businesses.

All these create confusion and uncertainty for e-commerce platforms and other allied businesses or service providers. This will adversely affect the growth of the e-commerce ecosystem in India, and hence, the ultimate analysis will end up against consumer interests. Without careful consideration, all of these may lead to hasty and inadequate responses in promising e-commerce sector, posing significant risks and challenges. These include increased uncertainty and regulatory overlaps that could detrimentally affect digital businesses, impede competition and innovation. For example, MSMEs might encounter increased compliance expenses, administrative complexities, and legal liabilities, hampering their capacity to invest in innovation, scale up their activities, and compete fairly with larger entities.

Institutionalising Holistic Stakeholder Consultations

The draft NEP of 2021, in various instances, highlights the need to constitute committees, bodies, and groups to help ascertain certain aspects of its provisions. Some of these have been highlighted earlier, such as a body of industry stakeholders to help identify rogue e-commerce entities, the Sanding Group of Secretaries on E-Commerce, etc.

Even though these are welcome attempts at taking into consideration the perspective of stakeholders in the e-commerce market, there still seems to be missing the perspective of all stakeholders, thus lacking inclusivity and holistic consultations.

For instance, the body envisaged for identifying rogue e-commerce entities is sought to include only industry players and trusted parties – the definition or the meaning of the latter being unclear. In that regard, what seems missing is the perspective of consumers themselves, who could perhaps be authentic voices to help identify such rogue entities. Thus, it would be prudent to include consumer groups, start-up communities, and MSMEs, among others, under the umbrella of 'body of stakeholders.'

An important step towards fostering an inclusive e-commerce ecosystem in India is to undertake multi-stakeholder consultations and give due importance to each category of stakeholder and the perspectives they bring to the table. This ensures a conducive environment for tech e-commerce platforms to operate, minimises compliance costs, avoids regulatory overlaps, and mitigates friction between regulators. For instance, if a business collaborates with competitors to fix prices, it could face penalties under the competition laws for breaching anti-competitive practices, which is also being incorporated in the DIB. thus, achieving clarity and coherence among various legislations and regulations through consultation is crucial.

4

Way Forward: Towards an Enabling Policy Framework for E-Commerce in India

In light of the developments in the e-commerce policy and regulatory landscape in India, it is imperative to focus on and work towards an enabling e-commerce policy, which can encourage and onboard more sellers and consumers to e-commerce services and ensure the inclusive and equitable growth of the e-commerce ecosystem in the country. In that endeavour, the following principles could be essential:

Ensuring Level Playing Field and Fair Competition

To ensure that domestic e-commerce entities can weather the storm of increasing competition nationally, and globally, it is important to create a level playing field. Undue advantage and leeway to domestic companies over foreign companies could risk complacency and disincentivise entities from innovating or going the extra mile. This may adversely impact the welfare of consumers and sellers who may get stuck with sub-optimal platforms.

It has been reported that the draft NEP of 2021 recognises the government's role in enabling a 'welfare state' and protecting the rights of people 'within its borders. While protecting the rights of consumers and weaker sections is a key responsibility of the state, it must not be forgotten that a sustainable mechanism to do the same is to enable competition on indicators of choice, quality, and price. Moreover, inefficiency must not be fostered under the garb of protecting weaker firms that are unable to innovate and compete.³⁷

³⁷ Arvind Mayaram and Garima Sodhi, 'Competition in e-tail: Fair or unfair?', Business Standard, 31 March 2021, https://www.business-standard.com/article/opinion/competition-in-e-tail-fair-or-unfair-121033001371_1.html.

Instead, barriers for domestic firms to grow, in terms of the high cost of finance, inputs, logistics, and competition with international firms must be removed. Also, reducing the compliance burden would be in the interests of smaller firms.

Fostering Collaboration between Regulators

The digital economy is governed by different agencies, including the CCI, sector regulators, the Ministry of Finance, DPIIT, the Central Consumer Protection Authority, and the proposed Data Protection Authority. It is imperative to foster a collaborative environment between all regulators to avoid over-regulation, inconsistency, or problematic behaviour falling between cracks. Any decision with respect to regulating the e-commerce space should not be taken in silos, and the perspective of all these regulators should be considered.

In this regard, the role of the CCI to review e-commerce related provisions of other domains from a competition lens will be crucial.³⁸ This is a practice in several jurisdictions and has also been recommended in the draft National Competition Policy.³⁹

The advocacy division of the CCI frequently conducts competition assessments of policies, laws, or regulations with the help of a group of empanelled institutions. It would be useful to assess the existing regulatory frameworks for e-commerce to ensure optimal competition and a level playing field in the sector.

Checking Optimal Risk-based Regulation

The e-commerce space must be neither under- nor over-regulated. The former could increase consumer concerns and disable a level playing field, among other things. In contrast, over-regulation could stifle innovation, enhance compliance burden and discourage new entrants into the e-commerce market.⁴⁰

Thus, the government should adopt optimal regulation, i.e., least restrictive regulation, to meet the desired objective. For this, a step-wise process could be implemented, where the government could identify risks that need to be curtailed and issues that need to be

³⁸ Arvind Mayaram and Garima Sodhi, 'Competition in e-tail: Fair or unfair?', Business Standard, 31 March 2021, https://www.business-standard.com/article/opinion/competition-in-e-tail-fair-or-unfair-121033001371_1.html.

³⁹ The Draft National Competition Policy, 2011, Ministry of Corporate Affairs, https://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf.

⁴⁰ Ramesh Abhishek, 'Public policies must provide an enabling environment, level-playing field,' The Indian Express, 21 April 2021, <https://indianexpress.com/article/opinion/columns/govt-public-policies-e-commerce-digital-india-fdi-policy-7282035/>.

addressed. Then it will be useful to undertake Cost-Benefit Analysis⁴¹ before introducing regulations, in order to ensure that the costs of regulation do not outweigh its envisaged benefits.

Optimal regulation of the sector will also require a comprehensive assessment of costs and benefits of possible regulatory options on different stakeholders, including consumers, small sellers, women entrepreneurs, artisans, among others. To this end, it is important to adopt best practices like Regulatory Impact Assessment (RIA)⁴² and comprehensive stakeholder consultation in the design of policy or regulation.⁴³ The government has a larger agenda on enabling ease of doing business and attracting foreign investment. The policy framework for e-commerce should be consistent in the spirit of such a larger agenda.

Securing Ease of Running Businesses

Recognising the potential of e-commerce, with respect to bringing in foreign investment, creating jobs, and providing safe buying avenues in a post-Covid era, the government must strive to ease the running of e-commerce business in India. The same would require an enabling, predictable, and proportionate regulatory regime with an unambiguous policy vision.

It has been reported that the draft NEP envisages a novel registration, reporting, and monitoring regime for e-commerce entities. The proposed amendments to E-Commerce Rules also intend to get the entities registered with DPIIT and mandate the appointment of a Chief Compliance Officer. While these proposals aim to improve transparency, supervision, and compliance, it needs to be balanced with the need for risk-based regulation to ensure that smaller players are not disproportionately and adversely affected by the compliance burden of the regulatory framework.

Reaching Out to Stakeholders

There is a need for the government to ensure inclusive stakeholder consultations before finalising any e-commerce policy or regulation. In addition to industry and trader representatives, stakeholders also require representation in such discussion. Similarly, start-ups and tertiary industry players must also be engaged in multi-stakeholder consultations.

⁴¹ 'Regulatory Impact Assessment (RIA),' CUTS International, <https://cuts-ccier.org/regulatory-impact-assessment/>

⁴² 'Initiatives on Regulatory Impact Assessment in India: Research, Capacity Building, and Advocacy', CUTS International, https://cuts-ccier.org/pdf/Summary_of_RIA_Initiatives_by_CUTS.pdf.

⁴³ CUTS has written to DPIIT to be involved as a consumer stakeholder for proposed consultations for the draft e-commerce policy. Other consumer organisations have taken similar steps, such as Consumer VOICE. Read more at: 'Consumer VOICE writes to DPIIT, recommending e-commerce policy framework,' Business Line, 30 March 2021, <https://www.thehindubusinessline.com/news/consumer-voice-writes-to-dpiit-recomending-e-commerce-policy-framework/article34197219.ece>.

Considering such principles will ensure a responsive and responsible e-commerce policy for India that considers all stakeholders' perspectives and concerns. Such a policy framework will help the development of an inclusive and equitable e-commerce ecosystem for India.